

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2020

Public Authority: The Department of Work and Pensions

Address: Caxton House
Tothill Street
London
SW1A 9NA

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for Work and Pensions (DWP) for information on how DWP applied the Public Sector Equality Duty in relation to DWP's 'People & Locations' strategy.
2. The Commissioner's decision is that DWP is entitled to rely on section 42(1) to withhold the legal advice falling within the scope of the request. However, DWP has breached sections 10(1) and 17(1) as it did not comply with its obligations under section 1(1) within the statutory timeframe.
3. No steps are required.

Request and response

4. The complainant wrote to DWP on 27 September 2019 and requested information in the following terms:

"When the Department's Hub Strategy was introduced in approx 2017; staff were expected to work from a designated office location. How did you apply the Public Sector Equality Duty, in relation to 'working from home' requests, particularly for parents, carers and staff with a disability that impacts their ability to travel to work? What information do you hold, what advice was sought and what legal advice, information was given regarding DWP's Public Sector Equality Duty towards their staff?"

5. On 28 October 2019, DWP provided its response. It provided an explanation regarding how it approaches compliance with equality legislation when implementing policies. It also explained how staff and

managers were required to discuss the individual staff member's circumstances and how individuals could request a review by the Exceptions Panel. DWP confirmed that information from these discussions and the panel were referenced in the overall Corporate Centre Equality Analysis. DWP confirmed that the Senior Responsible Officer leading the programme received advice from the Government Legal Department (GLD) regarding the Public Sector Equality Duty.

6. On 29 October 2019, the complainant requested an internal review of the handling of their request for information. The complainant confirmed that DWP had not answered the request in full and set out that DWP had not provided information about requests for homeworking. The complainant asked the following questions:
 - Were 'working from home' requests considered in the PSED?
 - Was there an intention to limit staff working from home?
 - Could you please explain how you undertook the equality analysis that you mentioned?
 - Could I get copies of the Equality Analyses and Exemption Panel decisions you mentioned?
 - Could I also have a copy of the Government Legal Department PSED advice to the Senior Responsible Officer?
7. On 18 November 2019, the complainant contacted DWP to confirm that the Hub Strategy referred to in their request is also known as the People and Locations policy. They requested a copy of the policy.
8. On 19 November 2019, DWP provided a response to the questions put to it on 29 October 2019. DWP provided explanations to the second and third question.
9. In response to the request for copies of the Equality Analyses, DWP refused to comply with the request on the basis of section 14(1). DWP explained that the documents contain significant amounts of sensitive personal information that would require redaction prior to disclosure. DWP explained that it would be burdensome for DWP to review and redact this information.
10. DWP withheld the Exemption Panel decisions under section 40(2) as they comprised the personal data of DWP employees.
11. On 19 November 2019, DWP provided the outcome of its internal review. DWP confirmed that it was satisfied that the original response was handled properly and that the outcome of the request was correct.

DWP explained that the reasoning for this was that the confidential conversation between the member of staff and their line manager was the opportunity for the member of staff to discuss their personal circumstances.

12. DWP went on to state:

“Under s41(1)¹ of the Act, information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information”.

13. On 29 November 2019, DWP responded to the complainant's clarification dated 18 November 2019. It confirmed that it held the information requested and provided an extract of a Question and Answer document that reflected the working from home policy information made available to staff.

Scope of the case

14. The complainant contacted the Commissioner on 3 December 2019 to complain about the way their request for information has been handled. In particular, they disputed that DWP had provided them with all of the requested information and that DWP could rely on legal professional privilege to withhold the legal advice.

15. Due to the impact of the Covid-19 pandemic on DWP, the start of the Commissioner's investigation was delayed. On 11 June 2020, the Commissioner wrote to DWP and asked it to review its handling of the request, in particular, she asked DWP to confirm what information it held falling within the scope of the request.

16. On 5 August 2020, DWP provided the complainant with a fresh response to their request. DWP confirmed that it held the following information:

- Corporate Centre Equality Analysis.
- Advice from the Government Legal Department regarding the Public Sector Equality Duty in relation to the Corporate Centre Equality Analysis.

¹ The Commissioner believes this to be an error as section 42(1) exempts information on the basis of legal professional privilege.

- Site level Equality Analyses.
 - Exemption Panel evidence discussion notes and decisions.
17. DWP provided a copy of the Corporate Centre Equality Analysis with personal data redacted under section 40(2).
 18. DWP confirmed that it was withholding the legal advice as it is subject to legal professional privilege, however, it again cited section 41(1) as the relevant exemption.
 19. DWP confirmed that it was withholding the Site Level Equality Analyses under section 14(1) as to provide this information would impose a disproportionate burden on DWP. DWP explained that a site level analysis was undertaken for each site within the scope of the programme and each of these documents include personal data relating to individuals. DWP confirmed that it was relying on section 14(1) due to the redaction burden on DWP.
 20. DWP confirmed that it was withholding the Exemption Panel information on the basis of sections 40(2) and 41(1) as it comprises personal data that was provided in confidence for the purposes of the Exemption Panel only.
 21. On 12 August 2020, the complainant contacted the Commissioner and confirmed that they wished to proceed with their complaint but only in respect of the legal advice provided by GLD.
 22. The Commissioner therefore considers that the scope of this case is to determine whether DWP is entitled to rely on section 42(1) of the Act to withhold the legal advice on the basis that it is protected by legal professional privilege.
 23. The Commissioner will also consider whether DWP complied with the procedural sections of the Act when responding to the request.

Reasons for decision

Section 42(1) – Legal professional privilege

24. Section 42 of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
25. There are two categories of legal professional privilege: advice privilege and litigation privilege.

26. In this case, the category of privilege DWP is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
27. DWP explained that the withheld information comprises advice provided by GLD in relation to the Corporate Centre Equality Analysis.
28. The Commissioner has examined the information which DWP is seeking to withhold on the basis of section 42(1) of the Act. She accepts that it constitutes a communication between a lawyer and their client, the main purpose of which was the provision of legal advice. Moreover, she is satisfied that this information is not in the public domain. Therefore, section 42(1) of the Act applies to this information.
29. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure

30. The complainant considers that as the policy has been implemented and no further discussions are required, the withheld information should be disclosed to assure the public that the Government's legal advice was properly taken into account.
31. The complainant explained that they are seeking the main legal advice which should include consideration of the PSED, the Convention on the Rights of Persons with Disabilities (CRPD), the UN Convention on the Rights of the Child (UNRC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).
32. The complainant explained that they would like to know if DWP overlooked the impact of their policy on their employees with childcare needs which as a group is likely to be largely women, thereby indirectly discriminating against woman under the Equality Act.

33. The complainant explained that the Equality Assessment appears to contradict itself. They confirmed that the Equality Assessment considers DWP's equality obligations but expresses the preference for staff to be based in the new locations despite identifying that a significant number of staff may be negatively impacted by the implementation of the policy. The complainant considers the points raised in the analysis to be counter-intuitive and contradictory to DWP's flexible working guidance and the introduction to the Equality Assessment.
34. The complainant considers that it is not clear how the Public Sector Equality Duty applies to staff making requests to work from home and has concerns that DWP may be breaching the Equality Act.
35. DWP confirmed that it had considered a number of arguments why the information should be disclosed, including that decision making across the Civil Service should be transparent and evidence based and that Government Departments should demonstrate that their decision making not only takes into account but also follows the rule of law.
36. DWP explained that in relation to the specific circumstances of this case, considerations of public policy and transparency were considered. DWP confirmed that it had considered the public interest in maintaining confidence in the integrity of DWP's internal decision making as an employer in respect of the treatment of its staff.
37. DWP explained that as a Department with significant policy responsibility for equality issues, there is evidently an argument in favour of DWP being seen as an exemplar employer and being transparent in the application of Diversity and Equality legislation to its own staff.
38. DWP explained that taking into account the concerns raised by the complainant, it had taken into account the public interest that would be served by disclosing the legal advice, as an assurance that the Public Sector Equality Duty was discharged by the Department in relation to the People & Locations policy for those individuals impacted by this policy.
39. DWP confirmed that it had considered the time that had passed between the date of the advice received and the date of the request, more than two years, and had assessed whether this advice remained 'live'. DWP explained that despite the passage of time, its considered that the advice remains live, as although the changes to the Corporate Hub estate were undertaken in 2017, DWP has continued the programme of changes to the profile of its operational estates.
40. DWP confirmed that it had also considered whether the disclosure of the requested information would affect a significant number of people. DWP

considers that the greatest public interest was amongst DWP staff but even within this population, those who were concerned by the process described within the documentation amounted to approximately 2,200 people out of a total headcount in DWP of some 84,000 as at April 2017.

Public interest in maintaining the exemption

41. DWP confirmed that it had considered the strong public interest implicit in the exemption as set out in *DWP Bellamy v The Information Commissioner and the DTI (EA/2005/0023)* where the tribunal stated:

"There is a strong element of public interest in built into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that in built public interest".

42. DWP also considered the judgement in *Thornton v IC (EA/2009/0071)* which identified a number of factors to be weighed in reaching a conclusion:

- "1. there is a strong element of public interest inbuilt in the exemption;*
- 2. there need to be equally strong countervailing factors for the public interest to favour disclosure;*
- 3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemptions;*
- 4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;*
- 5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people;*
- 6. the most obvious case where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained."*

43. DWP explained that it had taken into account a number of arguments in relation to the advice provided. DWP considers that, as a principle, there is a need for high quality, comprehensive legal advice to enable the effective management of the Department's affairs.

44. DWP considers that any legal advice received must present a full and frank assessment of the legal arguments, including both arguments in support of a position and potentially providing challenge and counter arguments to propositions that may or may not be accepted following deliberation by the client of the legal advice, in this case defined as the People & Locations programme. DWP considers that the disclosure of the legal advice may lead to legal advisers being more circumspect in their future legal advice, given concerns that it may be disclosed.
45. DWP considers that disclosure of the legal advice could also potentially lead to negative consequences as this may lead to a reluctance by future projects seeking and fully recording legal advice if they believe this could be at risk of release into the public domain, without the consideration of appropriate context.
46. DWP explained that the potential for a culture to develop whereby legal advice is either not sought or is provided with limited candour is not in the public interest as it could lead to decisions being taken which are not compatible with legal obligations, with the consequential loss of public money in the event that such decisions are challenged in court.
47. DWP explained that the nature of the advice given, relating as it does to DWP's Public Sector Equality Duty, strengthened the public interest in such advice remaining exempt. DWP explained that the public interest in the Department continuing to seek and act upon legal advice on legislation which is intended to protect an individual's rights is a strong consideration.
48. DWP explained that in considering the potential effect of disclosure and the number of people that could be affected, DWP considered that there was little public interest in releasing legal advice which directly affected only a small number of people, most of whom had been affected several years prior to the request.
49. DWP explained that while it had considered the public interest in favour of disclosure relating to DWP as an exemplar employer, it was not persuaded that this was a strong argument in favour of disclosure. DWP confirmed that due to the small number of employees involved, it considered that there was unlikely to be a great deal of public concern.
50. DWP explained that the subject matter of the advice did not have a significant reach and although for those individuals directly impacted, the affected may have been personally profound, the group of individuals directly affected was limited to a small population of staff within DWP.

51. In line with the sixth factor identified above, DWP confirmed that it had not misrepresented or ignored the advice that it has received in applying the policy to individuals.
52. DWP explained that it has considered the *"bona fides"* of the department in the representation of the advice and the pursuit of the policy to which it refers. DWP considered that the availability of the appeals panel process put in place to allow individuals a fair and balanced determination of their individual case indicated that it had not ignored the advice provided and had not in any way acted unconscionably in applying this advice.
53. DWP explained that it had reached the conclusion that the public interest lay in maintaining the exemption as although an individual may have a legitimate interest in understanding the advice, particularly, if it had a direct impact on themselves, that there was no strongly made case for a broader public interest in disclosure.
54. DWP explained that the disclosure of the legal advice would open DWP to criticism to which it would be unable to respond fully. DWP explained that this is because if the legal advice is taken as an abstract, it does not take into account the application of the principles raised during the later stages of the process, including exemption panel discussions held on individual cases. DWP considers that these exemption panel discussions are exempt from disclosure under sections 40(2) and 41(1) and therefore it could not counter any public discussion of the legal advice without breaching both its duty of confidentiality and its data protection obligations.
55. DWP considers that there may be interest from individuals who would wish to use any disclosed material to portray DWP in a negative light and it believes that this falls on the wrong side of the distinction drawn by Lord Wilberforce in *British Steel Corp v Granada Television Ltd [1981] AC 1096*:

"There is a wide difference between what is interesting to the public and what it is in the public interest to make known"
56. DWP set out that this was cited by the Information Tribunal in *Guardian Newspapers Ltd and Heather Brooke v the Information Commissioner and the British Broadcasting Corporation (EA/2006/001 and 0013)*.
57. DWP recognises that individuals who believe that they are subject to a breach of the Equality Act, within the terms of their employment are able to have legal recourse, ultimately to an Employment Tribunal. DWP contended that it is not in the public interest for the Department to be put into the position of conducting a defence of its position publicly by

means of the Act. DWP believes that the wider public interest rests with employment matters between DWP and its staff being resolved within the proper legal mechanisms available.

58. DWP explained that it had considered whether it is in the public interest for the department to release the information in order to enable individual employees and former employees to consider whether they may have a case against DWP in relation to the application of this policy.
59. DWP considers that this cannot be viewed as anything other than a weak argument, as per the decision in *Foreign & Commonwealth Office v IC (EA/2007/0092)*, where the Tribunal said:

"The interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid".

The balance of the public interest

60. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, she does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner (EA/2007/0055)* were clear:

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption" (para 41).

61. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is, and
- whether it is still live.

62. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
- the number of people affected by the decision to which the advice relates,
 - the amount of money involved, and
 - the transparency of the public authority's actions.
63. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
64. In many cases, the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
65. In the circumstances of this case, the Commissioner accepts DWP's position that whilst the relevant policy has been implemented, the legal advice may still be used in other DWP estate policies.
66. The Commissioner does not accept DWP's arguments that disclosure could lead to a culture of not seeking or recording legal advice. It is the role of civil servants, and programme leaders in particular, to obtain independent advice and record the decision making process.
67. The Commissioner also does not accept DWP's argument that disclosure would leave DWP open to criticism. Public authorities must accept that their decisions will be scrutinised and cannot expect to only disclose information that will meet with universal acceptance. The Commissioner also disagrees that DWP would not be able to counter this criticism. As DWP has set out, individual circumstances were considered by the Exemption Panel and whilst the individual circumstances were considered by the Exemption Panel and whilst the individual cases may not be disclosed, DWP has been able to confirm to the Commissioner that the policy has not been implemented in a blanket fashion and has provided the complainant with information about the process of the Exemption Panel which the Commissioner considers DWP could provide

to others to explain why the legal advice should not be considered solely by itself.

68. In light of the live nature of the advice, the Commissioner believes that there is a significant and weighty public interest in upholding the exemption. With regard to the disclosure of the information, the Commissioner agrees that there is a public interest in the release of information which would allow the public to understand how public authorities make decisions. However, the Commissioner notes that DWP has disclosed its Equality Analysis and, having viewed the withheld information, she does not consider that disclosure would aid the public's understanding further.
69. Consequently, taking into account the significant public interest in protecting LPP, the Commissioner is satisfied that the public interest favours maintaining the exemption contained at section 42(1) of the Act.

Section 10 & 17: Time for compliance

70. Section 1(1) of the Act states that:

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him"*

71. Section 10(1) of the Act states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt"*.

72. Section 17(1) of the Act states that:

"a public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies."*

73. Section 17(5) of the Act states that:

"A public authority which, in relation to any request for any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact".

74. As DWP failed to confirm that it held information within the scope of the request and that it was withholding some of that information under sections 14(1), 40(2) and 42(1) within the time for compliance, it has breached sections 10(1), 17(1) and 17(5).

Other matters

75. The Commissioner has concerns regarding the handling of this request for information. DWP failed to respond to a clear request for recorded information in accordance with the Act and instead provided explanations of its approach to the policy. DWP also failed to acknowledge this in its internal review.
76. As a large governmental department, the Commissioner considers that DWP has the resources and expertise to understand the basic principles of the Act and she would not expect DWP to make such a fundamental error when responding to a request under the Act.
77. DWP acknowledged these failings in its submissions to the Commissioner and the Commissioner expects DWP to take steps to improve both its request and internal review handling procedures.

Right of appeal

78. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

79. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
80. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Victoria Parkinson
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